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# Request for Declaratory Judgment/Legally Enforceable Obligation: Federal Appellate Court Addresses Dispute Between Solar Related Entities and Montana Public Service Commission

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The Montana Public Service Commission and its Commissioners (collectively “MPSC”) enacted a regulation, Montana Administrative Rule 38.5.1909, that removed the allegedly unlawful portion of the MPSC’s test for establishing a legally enforceable obligation (“LEO”).

The parties, Bear Gulch Solar, LLC, et al. (“Plaintiffs”) who brought suit against MPSC, did not assert that this new rule was unlawful.

The United States Court of Appeals, Ninth Circuit (“Court”) found the Plaintiffs’ request for declaratory judgement was moot. The Plaintiffs brought suit for an inability to contract, under the new regulation based on the Prior Tariff Rate. See *Bear Gulch Solar, LLC v. Montana Public Service Commission*, 2019 WL 2418917 (June 10, 2019).

The Court held although a court may decide a mooted issue if it is capable of repetition but evading review, that rule “applies only in exceptional situations, and generally only where the named Plaintiff can make a reasonable showing that it will again be subject to the alleged illegality.” It found there was no evidence in the record that the MPSC intended to re-implement the allegedly improper LEO. Therefore, the argument that MPSC may return to that standard was not enough to support a declaratory judgment. The Court stated “such a speculative possibility does not constitute a reasonable showing.”

The Court then looked to the Plaintiffs injunctive relief request in the United States District Court. It held that the lower court was correct in denying the relief because it was barred by the Eleventh Amendment. Specifically it was barred from bringing any lawsuit against MPSC itself.

The Eleventh Amendment permits suits “against the individual commissioner’s in their official capacities... if the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.” The Plaintiffs neither alleged an ongoing violation of federal law, nor sought relief properly characterized as prospective.

The Court explains the Plaintiffs' ongoing inability to contract in this instance at their preferred rate is seen as "merely continuing impact from" the alleged past violation. In other words, it is not a continuing violation of its own. The relief requested was deemed retroactive in nature. The Plaintiffs asking the prior rate apply only prospectively, serves to impose "a burden on the [MPSC] to determine which projects established [a] LEO on or before" the date provided. The court holds this retroactive relief is barred by the Eleventh Amendment and the Plaintiffs cannot retroactively apply the desired tariff rate.

A copy of the opinion can be downloaded [here](#).